STATE OF MICHIGAN

COURT OF APPEALS

DEANNA STASKIEVITZ,

Plaintiff-Appellant,

v

CITY OF ANN ARBOR,

Defendant,

and

BAGEL FACTORY, INC., and FRALEIGH'S LANDSCAPE NURSERY, INC., d/b/a ANN ARBOR SNOW REMOVAL SERVICE,

Defendants-Appellees.

UNPUBLISHED
April 22, 1997

No. 191675
Washtenaw Circuit Court
LC No. 94-001694

Before: Cavanagh, P.J., and Reilly, and C.D. Corwin,* JJ.

PER CURIAM.

Plaintiff, appeals as of right from orders granting summary disposition in favor of defendants Bagel Factory, Inc., and Fraleigh's Landscape Nursery, Inc. (Fraleigh's), pursuant to MCR 2.116(C)(10).[1] We reverse.

Plaintiff slipped and fell in snow as she returned to her car after purchasing items at the Bagel Factory. She slipped when she stepped off of the curb and onto the roadway. A Bagel Factory employee testified that, before plaintiff's fall, he shoveled snow from the sidewalk in front of the Bagel Factory into the street, up to the height of the curb.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Bagel Factory moved for summary disposition pursuant to MCR 2.116(C)(10) on the basis that plaintiff's deposition testimony indicated that the fall occurred in the street and the Bagel Factory had no duty to remove snow from the public street.

Fraleigh's also moved for summary disposition. Fraleigh's had a contract with the South University Merchant's Association to remove snow and ice from the sidewalks in front of certain commercial properties. Documentation attached to Fraleigh's motion for summary disposition indicates that Fraleigh's serviced the area at 5 a.m. on the day plaintiff fell. Fraleigh's argued that the evidence indicated that it had complied with its contractual obligations, and it had no legal duty to remove ice or snow from the public street.

Plaintiff responded that the testimony of Ron Fisher, the Bagel Factory employee, indicated that he pushed the accumulated snow and ice off of the sidewalk and onto existing snow piles, raising them to approximately curb level. Plaintiff argued that Fraleigh's and the Bagel Factory created an unnatural accumulation of snow and ice in an area used for pedestrian travel and thereby increased the risk of harm.

The trial court granted summary disposition in favor of defendants "because the fall took place in the street."

A trial court's determination of a motion for summary disposition is reviewed de novo on appeal. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). MCR 2.116(C)(10) permits summary disposition when, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion. *Id.* The court must give the benefit of reasonable doubt to the nonmovant and determine whether a record might be developed that would leave open an issue upon which reasonable minds may differ. *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 706; 532 NW2d 186 (1995). Before judgment may be granted, the court must be satisfied that it is impossible for the claim to be supported by evidence at trial. This Court liberally finds a genuine issue of material fact. *Id.*

We agree with plaintiff that the trial court erred in granting summary disposition in favor of the Bagel Factory. Plaintiff's theory of liability, although inartfully pleaded in the complaint, is one of misfeasance, based upon the employee's shoveling of the snow into the street. For the purposes of premises liability, a defendant's duty ends with the boundaries of the premises. *Ward v Frank's Nursery*, 186 Mich App 120, 131; 463 NW2d 442 (1990). However, aside from principles of premises liability, an owner or occupier of land may be liable in negligence for affirmative acts done on adjacent public lands. *Id.* at 132. "'[T]here is no duty, absent a statute, of an abutting owner as to the condition of the sidewalk or public way, unless the landowner has physically intruded upon the area in some manner or has done some act which either increased the existent hazard or created a new

hazard.'" (Emphasis added.) *Id.*, quoting *Berman v LaRose*, 16 Mich App 55, 57; 167 NW2d 471 (1969). In *Ward*, the plaintiff fell as she was walking in a public alley when she stepped into a hole covered with loose debris. Days before the plaintiff fell, Frank's Nursery demolished a wall separating the alley from its business premises, generating a considerable amount of debris. This Court held that Frank's Nursery was not entitled to summary disposition:

> Although the causes of the debris and the hole are unclear, it may be inferred that the deteriorating condition of the wall prior to its demolition or the process of demolition caused or contributed to the dangerous condition of the alleyway. If so, then liability against Frank's Nursery could be premised on the theory that the owner physically intruded upon the public alleyway (by casting debris) or that it increased an existing hazard or created a new hazard (by conduct causing or exacerbating hazards derived from the debris-covered hole). Concededly, this inference is tenuous, but it must be kept in mind that a claim should not be eliminated pursuant to MCR 2.116(C)(10) unless, after giving the plaintiff the benefit of all reasonable doubt and drawing all inferences in the plaintiff's favor, the claim cannot be supported by evidence at trial because of some deficiency which cannot be overcome. [*Id.* at 133.]

In the present case, we need not infer that the snow was placed into the public way by the Bagel Factory; Fisher has admitted shoveling snow off of the sidewalk. The circuit court in this case, as in *Ward*, erroneously believed that the occurrence of an injury outside of the landowner's premises precluded liability per se. *Id.* at 134. Because plaintiff has presented evidence that the Bagel Factory physically intruded upon the street or that it increased the existing hazard, the order granting summary disposition in favor of the Bagel Factory is reversed.[2]

We also agree with plaintiff that the trial court erred in granting summary disposition to Fraleigh's. The duty owed by Fraleigh's is the duty arising out of their undertaking to perform their contract, a common-law duty to perform with ordinary care the things agreed to be done. *Osman, supra* at 707-708. Those foreseeably injured by the negligent performance of a contractual undertaking are owed a duty of care. *Id.* This case is factually analogous to *Osman*, in which this Court reversed summary disposition granted in favor of Summer Green Lawn Care, a company, like Fraleigh's, which allegedly was negligent in the performance of a contract to remove snow. We likewise conclude that summary disposition was improperly granted in favor of defendant Fraleigh's.

The orders granting summary disposition in favor of defendants are reversed. Plaintiff as the prevailing party may tax costs pursuant to MCR 7.219.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Charles D. Corwin

[1] The City of Ann Arbor has been dismissed from the action and is not a party to the present appeal.

[2] The Bagel Factory suggests that summary disposition was properly entered in its favor because the condition was "open and obvious." That argument was not argued to the trial court and is not properly before us on appeal.